

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

**Citation:** Auld v. Emera Inc., 2008 NSSM 37

**Date:** 20080707

**Claim:** SCCH 295773

**Registry:** Halifax

**Between:**

Darlene Auld

Claimant

v.

Emera Incorporated and Nova Scotia Power Incorporated

Defendants

**Adjudicator:** W. Augustus Richardson, QC

**Heard:** June 24, 2008 in Halifax, Nova Scotia.

**Appearances:** Morgan Hicks for the Claimant  
With her, Janet Stevenson  
Tyana R. Caplan for the Defendants

**By the Court:**

[1] The claimant is a chartered accountant. She was employed as Controller by the defendant Nova Scotia Power Incorporated (“NSP”) in September 2002. She continued in that position until November 2005, when she was appointed as the Director of Internal Audit and Security for both NSP and the defendant Emera Incorporated (“Emera”). NSP is a wholly-owned subsidiary of Emera, which is a holding company.

[2] To encourage loyalty and hard work on the part of its senior executives Emera has developed a number of incentive programs. One of these is called the Restricted Share Unit (“RSU”) Plan. The RSU Plan is administered by a Management Resources and Compensation Committee (“MRCC”). The RSU Plan works as follows.

[3] The MRCC in conjunction with Emera executives decide on a number of RSUs to be granted to an eligible employee (such as Ms Auld). Ms Auld described RSUs as “phantom shares.” The grants are effective January 1<sup>st</sup> of the year in which they are granted. The RSUs are said “to vest” in the employee three years following the original grant date. As described by Emera’s RSU Plan Booklet (Exhibit C1, Tab 1, p.5), an employee holding RSUs is “eligible for a payout from an RSU grant if you remain employed with Emera at the end of the three year period after the grant date.” The amount of the payout is determined by a number of performance

factors and the share price of Emerca stock at that time. As described by the same booklet, the amount payable was “determined based on:

- a. the number of RSUs you [the employee] hold,
- b. the average share price (closing price during the 5 trading days) at the end of the 36 month financial measurement period;
- c. Emera’s relative financial performance over the 36 month period, and
- d. your employment status with Emera.”

[4] The parties were agreed that Ms Auld was granted a number of RSUs on January 1, 2005, and that the amount payable in respect of those RSUs (assuming liability to pay) was \$13,735.76. The issue however was whether Emerca was liable to pay.

[5] The issue arose out of the following facts, which were not disputed by the parties.

[6] In November 2007 Ms Auld gave notice of her intention to resign from Emerca, effective January 4, 2008. She gave notice rather than leaving immediately in November in order to give Emerca time to find and train a replacement for her; and because she wanted to stay until after the vesting date for her 2005 RSUs (which would be January 1<sup>st</sup>, 2008, being the three-year anniversary of the 2005 grant). Ms Auld remained at Emerca, and continued to be paid by it, until January 4, 2008. Following her departure she requested payment of the RSU amount. Emerca’s response was as follows:

“As laid out in the RSU plan, the MRCC retains the ultimate discretion to make RSU payouts. As the RSUs are meant as a retention tool, they chose not to make the payout as you had left the company.”

[7] Ms Hicks submitted on behalf of the claimant that the defendants were in breach of a contractual obligation to make the RSU payment. Since Ms Auld was an employee as of the vesting date (January 1, 2008) she was entitled to the RSU payment. The defendants were not entitled to withhold it, and they were in breach of contract by refusing to pay it.

[8] Ms Caplan submitted on behalf of the defendants that the RSU Plan was not a contract. It was a discretionary benefit plan. The intent and purpose of the RSU Plan was to encourage employees *as employees* to work hard for the defendants and to work for the long-term best interests of the defendants. The decision to grant RSUs was a discretionary decision within the power of the MRCC; and the MRCC had the discretion to refuse to make an RSU payment particularly if, as here, the underlying intent of the plan was no longer satisfied (because the employee had left the company). Since the amount payable under the RSU Plan depended, in part, on the employee’s “employment status with Emerca” (see above, para. [3]) Ms Auld, who was no longer an employee, could not ask for payment.

[9] In my view the defendants’ position cannot be maintained for two reasons:

- a. the RSU Plan makes clear that so long as the employee is employed as of the vesting date he or she is entitled to payment, and
- b. the RSU Plan is in fact a part of the employment contract between (in this case) Ms Auld and the defendants because the defendants have made it so.

### **A: Entitlement on Vesting**

[10] In my view a plain reading of the Emera RSU Plan Booklet makes clear that so long as the employee *is employed* as of the vesting date (that is, the date that is three years from the original grant of RSUs) the person is entitled to the RSU payment.

[11] For example, under the subhead “Entitlement Factor” the Booklet states at p.5 that the employee is “eligible for a payout from an RSU grant if you remain employed with Emera to the end of the three year period after the grant date.” In this case the grant date was January 1, 2005. Three years from that date was January 1, 2008. She had accordingly remained employed with Emera “to the end of the three year period.” The fact that Ms Auld had given notice that her employment would end on January 4, 2008 did not mean that she ceased to be an employee *before* that date—or that she was not an employee as of January 1<sup>st</sup>. She thus satisfied the Plan’s requirements for payment.

[12] Similarly, under the subhead “What happens if I leave my job?” the booklet states, at p.10, that “[i]f, *during* the 3 year period after a particular grant date, you leave Emera’s employment ... for any reason other than death, you are not entitled to a payout for that particular grant” (emphasis added). But Ms Auld did not stop or leave Emera’s employment “during the 3 year period.” She left *after* that period had ended.

[13] The defendants submitted that the MRCC retained an ultimate discretion to refuse to make a payout after the vesting date. They suggested that the fact that the employee is said to be “*eligible* for a payout” rather than, for example, “*shall* be paid” after the vesting date means that the MRCC could decide on its own to refuse to make a payment if it wished.

[14] There are several difficulties with this argument in my view.

[15] First, the use of the word “eligible” is at best ambiguous. And even if the MRCC retains some residual discretion under the Plan, such a discretion has to be exercised reasonably and in good faith. No reason was offered in this case for the defendants’ refusal to make the RSU payment, other than that Ms Auld was no longer an employee at the time the payout was to be made. But there is nothing in the booklet that expressly states that the MRCC can refuse to make a payout to an employee whose RSUs have vested and who has satisfied all the other conditions set out in the Booklet’s description of the plan. Moreover, as noted above, when the booklet does speak of employment status it always does so in the context of a three-year commitment. It cannot in my view be a fair and reasonable exercise of discretion to purport to deny a benefit to

an otherwise-entitled employee on the grounds that they fail to satisfy a condition that was not made express or even hinted at before the employee's RSU entitlement vested.

[16] Second, the defendants' submission is in effect one that actually alters the express terms of the Plan. The Plan calls for a three-year commitment from the employee. It says nothing about the employee's status after the vesting date. To say that the MRCC has the right to refuse payment if an employee ceases to be an employee after the vesting date means, in effect, that the employee now has to give a commitment that is longer than three years in order to secure payment of the RSU. But if the defendants had wanted a longer commitment they could have spelled it out in their plan. They did not. It cannot then be a reasonable or fair exercise of a discretion for the defendants to change a specific condition of the Plan (particularly one that requires a significant commitment in time from the employee) after the fact.

[17] Accordingly, the fact that the RSU is not actually paid out until sometime in February does not in my view change the fact that as of the vesting date (that is, January 1, 2008) Ms Auld satisfied all of the conditions spelled out in the RSU Plan Booklet for payment of her RSUs. She is accordingly, and pursuant to the defendants' own booklet wording, entitled to be paid her RSU payment.

## **B: Part of Her Employment Contract**

[18] Ms Caplan submitted that the RSU Plan was a discretionary benefit that was not part of Ms Auld's employment contract. That being the case the defendants could change the benefit and its entitlements (and the conditions of those entitlements) whenever it wanted.

[19] I can accept for purposes of the defendants' submission that the RSU Plan may not have been part of Ms Auld's contract of employment, in the sense that:

- a. her employer was not required to provide the plan, or
- b. her employer was not required to give her RSUs in any particular year.

[20] However, the fact that the benefit was not part of her basic employment contract does not mean that her entitlement to a payout of RSUs could not become contractual in nature, either as part of her employment contract or as a separate, collateral contract between her and the defendants.

[21] I start with the observation, made above, that nothing bound Ms Auld to stay with the defendants for any particular period of time. But the defendants wanted, for obvious reasons, to encourage employees like her not only to stay but to devote their skill and expertise to making the defendants operations as profitable as possible. So the defendants struck the following bargain with them: *if* you stay with us for three years, we will make a certain payment to you. The consideration for the defendants' offer is supplied by the employee once he or she stays the required three years. Whether this binding promise was part of Ms Auld's original contract of

employment or represented a separate, collateral contract is not relevant for our purposes. What is relevant is that the defendants' promise was contractual in nature.

[22] Even if I am wrong in this conclusion, it seems to me that the defendants' are estopped from resiling from the promise's made to Ms Auld in the RSU Plan Booklet. Ms Auld was under no obligation to stay with the defendants for three years. But she shifted her position (that is, she committed to the defendants for three years) in reliance on their representation that if she did they would give her something: payment of her RSUs. The defendants cannot now, after receiving the benefit they hoped to achieve from Ms Auld, go back on their word. They cannot avoid the consequences of the representation they made to her.

[23] Nor can Emera complain that it has been shortchanged by an employee who leaves after the vesting date. Emera had only requested a three year commitment. They received it in Ms Auld's case. It cannot now go back on its promise simply because she decided to terminate her employment after that commitment was fulfilled.

### **Conclusion**

[24] For the above reasons I am satisfied that:

- a. Ms Auld's right to payment in respect of her RSUs had vested as of January 1, 2008;
- b. that right was contractual;
- c. she was still an employee of Emera on the vesting date; and
- d. having satisfied all the terms of the contract Ms Auld was entitled to payment.

[25] I will accordingly make an order that the defendants pay to Ms Auld \$13,735.76 plus costs.

Dated at Halifax, this 7th day of July, 2008

Original: Court File )  
Copy: Claimant )  
Copy: Defendants )

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W. Augustus Richardson, QC  
ADJUDICATOR